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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 30 2004

EAC 03 046 54695

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Michael Valdez

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a hazardous waste abatement and removal firm. It seeks to employ the beneficiary permanently in the United States as an asbestos handler. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that it had not established that the proffered position qualifies as a position for a skilled worker. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Section 203(B)(3)(a)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $23.15 per hour, which equals $48,152 per year.

On the petition, the petitioner did not state the date upon which it was established and did not state the number of workers it employs. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in various locations.

On the Form I-140 petition the petitioner checked a box to indicate that the petition is for a skilled worker or a professional pursuant to section 203(b)(3)(A)(i) or section 203(b)(3)(A)(i) of the Act. The Form ETA 750, however, states that the position requires only one month of experience and has no training or education requirement.

With the petition, counsel submitted a letter dated October 31, 2002. On that letter, counsel stated that she was submitting "Copy of U.S. Income Tax Returns." [sic] No income tax returns were submitted. Counsel submitted no other evidence of the petitioner's ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on December 27, 2002, requested, *inter alia*, evidence pertinent to both of those issues. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date.

The notice also stated,

> It does not appear that your petition is approvable to classify the beneficiary as a third preference alien under section 203(b)(3)(A)(i) of INA because the labor certification states that only one month of experience is required. Section 203(b)(3)(A)(iii) is used to classify positions requiring less than two years of experience. If you wish to change the requested preference classification, please place an "X" next to the sentence below. Also indicate the new preference number and classification that you are seeking and sign where indicated.

The notice also provided an area for the petitioner to show its election to amend the classification for which it was petitioning.

"_____I request that my petition be adjudicated as a ____ preference petition under section _____."

A checkmark was placed in the space before that sentence. The word "THIRD" was added in the space before the word preference. In the area reserved to enter an INA section number, "203(b)(3)(A)(i)" was added. In a space reserved for the petitioner's signature, the initials "YB"[1] and the date "2/4/03" were placed. The section number clearly refers to section 203(b)(3)(A)(i) of the Act, the section pertinent to skilled worker petitions and petitions for professionals.

In response to the request for evidence of the petitioner's ability to pay the proffered wage, counsel submitted the petitioner's balance sheet and income statements for 2001. A notation at the bottom of each page states "Subject to comments in accompanying letter of transmittal." The transmittal did not accompany those financial statements. As such, they contain no indication that they are audited financial statements.

The director denied the petition on May 2, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and that the proffered position is not a position for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act.

On appeal, counsel asserts that the petitioner inadvertently indicated that the petition is for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act when it should have indicated that the petition is for an unskilled worker pursuant to section 203(b)(3)(A)(i). Counsel asked that the petition be amended.

Counsel also indicated that the petitioner had inadvertently failed to include the accountant's transmittal letter that should have accompanied the 2001 financial statements. Counsel provided a copy of that transmittal letter, which indicates that the petitioner's 2001 financial statements were reviewed by the accountant, but were not produced pursuant to an audit.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's transmittal letter makes clear that the financial statements that the financial statements submitted in this case are unaudited. As that transmittal letter also makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are unreliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

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[1] This office notes that the Form I-140 petition, the Form ETA 750, and the Form G-28 Entry of Appearance were signed by Yemi Babatunde.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983).

The proffered wage is $48,152 per year. The priority date is April 30, 2001. In the instant case, the petitioner submitted no reliable evidence of its financial condition at any time. Therefore the petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

Counsel indicates that the petitioner intended to amend the petition into a petition for an unskilled worker and asks that this office now amend it. The petitioner was explicitly offered an opportunity to amend the petition previously and failed to do so. This office is not now inclined to amend the petition, on appeal, to render it approvable.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.